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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. RICKIE A. MARTINEZ, Defendant and Appellant.	C046751 (Super. Ct. No. 97F00253)

A jury convicted defendant Rickie A. Martinez of first degree murder (count I), attempted robbery (count II), conspiracy to commit robbery (count III), and assault with a deadly weapon (count IV). The jury found that arming allegations on counts I and II were true and that a robbery-murder special-circumstance allegation on count I was not true.

The trial court sentenced defendant to state prison for 25 years to life on count I, plus a consecutive determinate term of seven years consisting of five years on count III, one year on count IV, and one year for the arming enhancement on count I.

The trial court stayed the sentence and enhancement on count II pursuant to Penal Code[1] section 654.

Defendant appealed to this court, contending: (1) his sentence of 25 years to life for murder was cruel or unusual within the meaning of article I, section 17 of the California Constitution as construed in *People v. Dillon* (1983) 34 Cal.3d 441; (2) his *Faretta*[2] motion on the 16th day of jury trial was erroneously denied; and (3) his sentence on count III had to be stayed pursuant to section 654. We rejected defendant's first two contentions and found merit in his third.[3] Because the trial court had previously designated count III the principal determinate term, we remanded for resentencing.

On remand, defendant renewed his contention that his murder sentence was cruel or unusual. He offered evidence of his post-sentence conduct in prison and argued he had "conducted himself in an exemplary fashion." He requested a determinate sentence or, in the alternative, the statutory punishment for second degree murder -- 15 years to life. He also sought a mitigated, concurrent term on count IV based on the same evidence.

Following presentation of documents, testimony, and argument, the trial court ruled that the doctrine of law of the

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 *Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562].

3 The People conceded this point.

case barred reconsideration of the cruel or unusual punishment claim. The court then stated that even if it could consider defendant's claim under *Dillon*, the court would conclude defendant's indeterminate sentence for murder was not cruel or unusual. The court declined to order a probation report, reinstated the sentence on count I and its enhancement, stayed the sentences on counts II and III pursuant to section 654, imposed the upper term of four years on count IV, and ordered the sentences on counts I and IV to be served consecutively.

Defendant again appeals, this time contending the trial court erred by: (1) ruling it could not consider the claim that his sentence on count I is cruel or unusual based on new evidence of his conduct in prison; (2) failing to order a new probation report; and (3) basing its sentencing decision on facts that were not admitted by him or found true by a jury. We shall affirm the judgment.

FACTS

The specific facts of this case are largely irrelevant to the issues on appeal. Suffice it to say that defendant was convicted of participating in a botched robbery with four other men. One of the victims ultimately died as a result of being shot during the hold up by one of defendant's cohorts.

DISCUSSION

I

Cruel Or Unusual Punishment

Defendant contends the trial court erred when it ruled that the law of the case doctrine precluded it from considering his

claim of cruel or unusual punishment based on evidence of his conduct in prison. He contends that doctrine does not preclude the court from reaching a different result on retrial where, as here, different evidence is presented at the later proceeding. (See *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1261; *In re Saldana* (1997) 57 Cal.App.4th 620, 627, fn. 2.) He also argues that "when a case is remanded for resentencing after an appeal, the defendant is entitled to 'all the normal rights and procedures available at his original sentencing' [citations], including *consideration of any pertinent circumstances which have arisen since the prior sentence was imposed* [citation]." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 460; italics added.)

The People express "no opinion on whether the trial court had discretion to revisit the cruel or unusual punishment issue." Instead, they contend any error in refusing to revisit the issue was harmless because "[t]he trial . . . stated that, if he did have discretion to revisit the cruel or unusual sentence issue, he would deny [defendant's] claim."

Assuming for the sake of argument that the trial court erred when it refused to reconsider defendant's claim of cruel or unusual punishment based on new evidence of his conduct in prison, we nonetheless agree with the People the error was harmless, although not for the reason the People suggest.

The People contend the error was harmless because, having heard "all the relevant evidence," the trial court stated it would deny defendant's claim. The flaw in this argument is that

before the trial court stated it would deny defendant's claim, the court unequivocally stated that it had "no discretion . . . to entertain further evidence and/or testimony in support of the Dillon argument." Furthermore, when the court actually made its alternative ruling -- stating that even if it could revisit defendant's claim of cruel or unusual punishment, it would deny that claim -- the court cited only evidence predating defendant's original sentencing; it did not mention any of the evidence of defendant's conduct in prison after he was originally sentenced. Thus, contrary to the People's position, it is apparent that in alternatively revisiting defendant's *Dillon* argument, the trial court did *not* consider "all the relevant evidence" before it.

Even so, we conclude beyond a reasonable doubt that *had* the trial court considered the evidence of defendant's conduct in prison, the court still would have rejected his claim that his sentence of 25 years to life in prison for first degree murder is cruel or unusual. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711] [stating harmless error rule for federal constitutional error].)[4] This conclusion follows from the trial court's actions on the determinate portion of defendant's sentence.

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[4] We assume for the sake of argument that defendant is correct in his contention that the *Chapman* standard of harmless error applies here because "[w]hen a defendant . . . is deprived of the sentencing procedures guaranteed by him by state law, the due process clause of the Fourteenth Amendment . . . is violated."

Because the sentences on counts II and III had to be stayed, on remand the trial court designated count IV the principal determinate term and had to determine what sentence to impose on defendant for that crime. Based "in some large measure" on the evidence of his conduct in prison, defendant asked the court "to pick the low term on Count Four and run it concurrently to the rest of the sentence or . . . even pick the high term on Count Four and run it concurrent rather than consecutively," as well as stay the additional one year term for the enhancement on count I.

Although the court acknowledged the evidence of "how [defendant was] conforming [his] conduct and what changes [he had] made in [his] life in prison," the court nonetheless rejected defendant's request for a lesser determinate sentence and instead imposed the upper term on count IV, to be served consecutively, and also reimposed the one year term for the enhancement on count I, also to be served consecutively.

In other words, the trial court imposed the harshest determinate sentence that it could on defendant under the circumstances. Given this fact, we are convinced beyond a reasonable doubt that had the trial court considered defendant's claim that his murder sentence is cruel or unusual because of his conduct in prison, the trial court would have rejected that claim without hesitation, concluding (as this court did in its earlier opinion) that the sentence is "not disproportionate to

his individual culpability" and "does not shock the conscience or offend fundamental notions of human dignity."[5]

II

Resentencing On Count IV

Defendant contends that even if resentencing is not required on count I, it *is* required on count IV because: (1) no supplemental probation report was obtained; (2) the resentencing court did not justify its selection of consecutive sentences and the upper term; (3) imposition of the one-year arming enhancement was irrational; and (4) the facts used to justify the consecutive sentence and the upper term were not found by a jury to be true beyond a reasonable doubt. We consider these claims in turn.

A

Failure To Order A Probation Report

Rule 4.411(c) of the California Rules of Court provides that "[t]he court shall order a supplemental probation officer's report in preparation for sentencing proceedings that occur a significant period of time after the original report was prepared." Here, 28 months elapsed between defendant's original sentencing in December 2001 and his resentencing in April 2004. The People do not dispute that this period of time was

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[5] Indeed, defendant does not even argue otherwise, as his briefs are devoid of any harmless error analysis addressed to this particular claim of error.

"significant";[6] thus, it appears the trial court erred in failing to order a new probation report.

The People contend the absence of a supplemental probation report was harmless. We agree.

The trial court commended defendant's counsel for presenting "everything that could possibly be brought in support of somehow modifying your sentence either pursuant to [*People v. Dillon*, *supra*, 34 Cal.3d at p. 441] or [based] on your conduct since you were sentenced, the way you've behaved and conformed in the custody of the Department of Corrections." Defendant does not contend, and the record does not suggest, the probation officer could have discovered or unearthed any facts that had not been made known to the court. (See *People v. Llamas* (1998) 67 Cal.App.4th 35, 40-41 [supplemental report reiterating information conveyed by other sources would not have added to the defendant's efforts to persuade the court to make more lenient sentencing choices].) On this record, the failure to obtain a supplemental probation report was patently harmless. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 [stating harmless error rule for state law error].)

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[6] The Advisory Committee comment to rule 4.411(c) explains: "Subdivision (c) is based on case law that generally requires a supplemental report if the defendant is to be resentenced a significant time after the original sentencing, *as, for example, after a remand by an appellate court* . . . . The rule is not intended to expand on the requirements of those cases." (Italics added)

B

Imposition Of Consecutive Sentence And Upper Term

The trial court chose to sentence counts I and IV consecutively and to impose the upper term on count IV, as follows:

"I am going to redesignate Count Four, your conviction for assault with a deadly weapon in violation of Penal Code section 245(a)(1), as the principal term for a determinate sentence which I am going to order to be served consecutive to and separate from the indeterminate sentence, and I am going to select the upper term of four years for your conviction for Count Four for the following reasons:

"That the crime indeed involved great violence, it is a separate victim [who] was involved with respect to Count Four, your unsatisfactory performance as a juvenile ward, and the fact that you were on a form of juvenile ward adjudication and/or probation at the time that this offense was committed.

"And as I noted earlier, in light of the great violence and cruelty attended to the crime, I believe Count Four -- I beg your pardon, the upper term of four years is the just term and do indeed impose a consecutive term of four years, and I order that it be consecutive because it was a separate victim involved."

Defendant did not object to the trial court's articulation of its reasons for the upper term nor the consecutive sentence. Thus, he has forfeited any claim of error. (*People v. Scott* (1994) 9 Cal.4th 331, 353.)

In any event, there was no prejudicial error. The first paragraph makes plain that the trial court *chose both* the upper term *and* a consecutive sentence. The second paragraph is ambiguous as to which factors the court used to support which choice. We construe the third paragraph to mean that the "separate victim" factor supports the consecutive sentence, not the upper term. This obviates defendant's contentions that the factor cannot support the upper term and that its further use to support a consecutive sentence constitutes a prohibited dual use of facts.

Defendant also claims the "separate victim" factor cannot support a consecutive sentence because counts I and IV each had just one victim. He relies on our decision in *People v. Humphrey* (1982) 138 Cal.App.3d 881, 882, which construed former rule 425(a)(4) of the California Rules of Court. Such error is harmless because the consecutive sentence is supported by rule 425(a)(2). The shooting of one victim, on which count I was based, and the assault on another victim, on which count IV was based, were "separate acts of violence" within the meaning of this rule. (See *People v. Calderon* (1993) 20 Cal.App.4th 82, 86-87.)

Finally, the record does not support defendant's claim that the trial court "completely ignored" the mitigating factors of his remorse: his good conduct in prison, and his progress toward rehabilitation. As noted, the court commended defendant's counsel for presenting "everything that could possibly be brought" in mitigation. The court's failure to

expressly reject these factors on the record does not mean it did not consider them.

C

Arming Enhancement

Defendant contends the trial court abused its discretion by denying his request to strike the count I arming enhancement pursuant to section 1385. We disagree.

The People claim defendant waived this issue by "failing to request that the trial court dismiss the enhancement at sentencing." However, defendant requested dismissal in his reply memorandum regarding reduction of sentence. What he failed to do was object to the trial court's statement of reasons for refusing the request. Thus, he has forfeited any claim of error regarding the court's exercise of its discretion. (*People v. Scott, supra,* 9 Cal.4th at p. 353.)

In any event, defendant's claim has no merit. The trial court imposed the arming enhancement because of the "seriousness of the offense," the "gravity of the injuries suffered by the victim, that is, death," and the "planning and the sophistication attended to the commission of that offense."

Defendant claims the botched robbery that preceded count I was "not a sophisticated operation." He overlooks evidence that one of his cohorts had previously robbed the store of a substantial amount of money; thus, the present crime was not only planned but also tested. In addition, a vehicle was stolen for the event; masks and a weapon were obtained; and the group decided who would drive, who would enter the store, and who

would wield the shotgun. Because the evidence supports the finding of planning, it is not necessary to consider defendant's arguments regarding the other findings.

D

Blakley Issues

1. *Imposition Of Upper Term*

Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely v. Washington* (2004) 542 U.S. ___ [159 L.Ed.2d 403, 413-414].)

Relying on *Apprendi* and *Blakely*, defendant effectively claims the trial court erred in imposing the upper term on count IV because the court relied upon facts not submitted to the jury and proved beyond a reasonable doubt, thus depriving him of the constitutional right to a jury trial on facts legally essential to the sentence.

The contention fails. One of the reasons the trial court gave for imposing the upper term was defendant's "unsatisfactory

performance as a juvenile ward, and the fact that you were on a form of juvenile ward adjudication and/or probation at the time that this offense was committed."

As we have noted, the rule of *Apprendi* and *Blakely* does not apply to a prior conviction used to increase the penalty for a crime. The plain language of rule 4.421(b)(2) of the California Rules of Court authorized the trial court to consider sustained juvenile petitions as an aggravating factor when deciding whether to impose the upper term. Because California juvenile proceedings provide the necessary procedural safeguards (see *People v. Lee* (2003) 111 Cal.App.4th 1310, 1315-1316), we conclude defendant's juvenile adjudication comes within the prior conviction exception to the rule of *Apprendi* and *Blakely*.

The trial court considered one factor unrelated to defendant's juvenile adjudications: the "great violence and cruelty attended to the crime." However, a single valid factor in aggravation is sufficient to expose defendant to the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) There is no indication that the improper consideration of "great violence and cruelty" tipped the balance toward the upper term and away from a lesser term that the trial court would have selected had it considered only the prior juvenile adjudication. The court's consideration of "great violence and cruelty" was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24 [17 L.Ed.2d. at pp. 710-711].)

2. *Imposition Of Consecutive Sentences*

Defendant effectively claims the trial court erred in sentencing counts I and IV consecutively because the court relied on facts not submitted to the jury and proved beyond a reasonable doubt, thus depriving him of the constitutional right to a jury trial on facts legally essential to the sentence. The claim of error fails because the rule of *Apprendi* and *Blakely* does not apply to our state's consecutive sentencing scheme.

Section 669 imposes an affirmative duty on a sentencing court to determine whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively. (*In re Calhoun* (1976) 17 Cal.3d 75, 80-81.) However, that section leaves this decision to the court's discretion. (*People v. Jenkins* (1995) 10 Cal.4th 234, 255-256.) "While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

Section 669 provides that upon the sentencing court's failure to determine whether multiple sentences shall run concurrently or consecutively, then the terms shall run concurrently. This provision reflects the Legislature's policy of "speedy dispatch and certainty" of criminal judgments and the sensible notion that a defendant should not be required to serve a sentence that has not

been imposed by a court. (*In re Calhoun, supra*, 17 Cal.3d at p. 82.) This provision does not relieve a sentencing court of the affirmative duty to determine whether sentences for multiple crimes should be served concurrently or consecutively. (*Ibid*.) And it does not create a presumption or other entitlement to concurrent sentencing. Under section 669, a defendant convicted of multiple offenses is entitled to the exercise of the sentencing court's discretion but is not entitled to a particular result.

The sentencing court is required to state reasons for its sentencing choices, including a decision to impose consecutive sentences. (Cal. Rules of Court, rule 4.406(b)(5); *People v. Walker* (1978) 83 Cal.App.3d 619, 622.) This requirement ensures that the sentencing judge analyzes the problem and recognizes the grounds for the decision, assists in meaningful appellate review, and enhances public confidence in the system by showing sentencing decisions are careful, reasoned, and equitable. (*People v. Martin* (1986) 42 Cal.3d 437, 449-450.) But the requirement that reasons for a sentence choice be stated *does not create a presumption or entitlement to a particular result*. (See *In re Podesto* (1976) 15 Cal.3d 921, 937.)

Therefore, entrusting to trial courts the decision whether to impose concurrent or consecutive sentencing under our sentencing laws is not precluded by the decision in *Blakely.* In this state, every person who commits multiple crimes knows that he or she is risking consecutive sentencing. While such a person has the right to the exercise of the trial court's discretion, the person does not have a legal right to concurrent sentencing, and as the Supreme

Court said in *Blakely*, "that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." (*Blakely v. Washington, supra,* 542 U.S. at p. ___ [159 L.Ed.2d at p. 417].)

Accordingly, the rule of *Apprendi* and *Blakely* does not apply to California's consecutive sentencing scheme.

Nor does the rule of *Apprendi* and *Blakely* require a jury determination of the facts surrounding defendant's claim of cruel or unusual punishment on count I. By claiming cruel or unusual punishment, defendant sought to *decrease* his punishment *below* the statutorily prescribed 25 years to life. *Apprendi* and *Blakely* apply to exactly the opposite situation.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

SIMS, Acting P.J.

HULL, J.